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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GIOVANNA CAPONE, Defendant and Appellant.	D056093 (Super. Ct. No. SCD215609)
In re GIOVANNA CAPONE on Habeas Corpus.	D056870

CONSOLIDATED APPEAL from a judgment of the Superior Court of San Diego County, Margie G. Woods, Judge, and petition for writ of habeas corpus. Judgment affirmed; petition denied.

Giovanna Capone entered a negotiated guilty plea to two counts of grand theft (Pen. Code,[1] § 487, subd. (a)), two counts of elder theft (§ 368, subd. (d)) and two counts of filing a false instrument (§ 115, subd. (a)). Capone also admitted that the amount of loss with respect to one of the counts of grand theft exceeded $150,000 within the meaning of former section 12022.6, subdivision (a)(2). Under the plea bargain, more than 30 other theft-related and forgery counts were dismissed. The plea bargain called for a stipulated sentence of eight years in prison. The trial court sentenced Capone in accordance with the plea bargain. In a subsequent restitution hearing, the court ordered Capone to pay $915,395 in restitution to nine individuals and five businesses.

Capone did not obtain a certificate of probable cause.

FACTS

Between 2005 and 2008, Capone, who had a background as a loan processor, sold fraudulent second mortgage investments on real property owned by friends and acquaintances without the consent, participation or knowledge of the property owners. She also fraudulently arranged for the purchase of two residences by submitting a bogus loan application in the name of a long-time friend.

In 2006 Kellee Sauter agreed to sell her Carlsbad residence to Capone for $905,000. Later, Capone told Sauter that for loan qualification purposes her mother, Carolyn Jarnagin, would purchase the property. Jarnagin, however, was not Capone's mother. Rather, Jarnagin, who was 88 years of age at the time of the preliminary hearing,

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1 Statutory references are to the Penal Code.

and Capone were friends who met through Republican Party activities. Unbeknownst to Jarnagin, Capone had arranged a $724,000 mortgage loan for her through Washington Mutual Bank to finance the purchase of Sauter's residence by forging Jarnagin's signature on the loan application and notarizing the signature. After the sale, Capone lived in Sauter's former residence before it was repossessed. Washington Mutual reported losing $191,000 in the transaction.[2]

Capone also used Jarnagin's Clairemont residence as collateral for short-term loans from Charles Crowder of $40,000, from Alonso Sanchez of $69,000 and from John Lancia of $20,000. Again, this was done without Jarnagin's consent, participation or knowledge. Capone forged Jarnagin's signature on deeds of trust and notarized the forged signature. Jarnagin spent two years restoring her credit and paid $1,200 in attorney fees.

Capone also used the Mira Mesa residence of Kenneth Moser and the Encinitas residence of Leah Firth as collateral for short-term loans without the consent, participation or knowledge of Moser and Firth. Moser and Capone were in a romantic relationship and lived together. Capone had met Firth at a church's women retreat, and had attended Bible study in Firth's home. Moser's signature was forged on a deed of trust to secure a $48,500 loan from Juan Sanchez (Sanchez), a $48,500 loan from John Lancia and a $48,500 loan from Maria Consuelo Vanegas. Capone notarized Moser's forged

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[2] In 2005, unbeknownst to Jarnagin, she "purchased" a condominium in Carlsbad with a fraudulent loan obtained by Capone through the Argent Mortgage Co. At that time Jarnagin believed Capone had bought the condominium because Capone lived there.

signature. Firth's signature was forged on a deed of trust to secure a $68,000 loan from Sanchez. Sanchez later sold the loan to his friend Naomi Okumura so that he could invest the money in a spa that Capone was planning to operate. Sanchez made two monthly payments on the loan to Okumura to cover for Capone.

In addition to making what he believed to be high yield, low risk loan investments, Sanchez also recruited or advised other people to make similar loans through Capone, including his brother, Alonso Sanchez, and Vanegas. On the various loans that Capone pitched to Sanchez, she presented bogus loan packages—including false employment and credit history for each so-called borrower.

Justin Isaac, who met Capone in 2002 when he was a loan officer for a mortgage company and she was processing paperwork for the same company, participated in four successful short-term loan investments with Capone and one unsuccessful one. The fifth unsuccessful loan made by Isaac through Capone was for $61,749.

Charles Crowder, a loan officer, participated in two short-term investments with Capone. The first of these investments was a $40,000 loan secured by a deed of trust to Jarnagin's house; Crowder was repaid on this loan.[3] Crowder's next loan with Capone did not work out as well as the first one. Crowder made a nine-month loan of $50,000 to Capone for her spa. Crowder received four monthly payments, totaling $2,500; after that, Crowder did not receive any payments and the loan was not paid back.

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[3] Crowder later learned that his forged signature appeared on the bogus application purportedly by Jarnagin for a $724,000 loan from Washington Mutual to finance Capone's purchase of the Carlsbad property from Sauter.

After the plea bargain, Capone filed a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118), and new counsel, Frank McClelland, was appointed for the restitution hearing. Capone did not attend the restitution hearing; she twice waived her presence at the hearing. At the restitution hearing, the parties stipulated that the following restitution was owed in the following amounts to the following persons or companies: $1,250 to Jarnagin; $145,000 to Lancia; $84,000 to Alonso Sanchez; $61,000 to Isaac; $121,000 to Argent Mortgage Co.; $191,000 to Washington Mutual (now Chase) Bank; $25,000 to Moser; $835 to AT&T Co.; $1,847 to U.S. Bank; and $963 to Washington Mutual (now Chase) Bank. The trial court, after hearing evidence, also ordered Capone to pay restitution in the following amounts to following persons: $72,000 to Sanchez; $98,500 to Venegas; $65,500 to Naomi (Okumura) Hobbs; and $47,500 to Crowder.

Capone filed a notice of appeal from the restitution order.

DISCUSSION

I. APPEAL

Appointed appellate counsel has filed a brief setting forth the evidence in the superior court. Counsel presents no argument for reversal but asks this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to as a possible, but not arguable, issue: whether the trial court's restitution awards were supported by substantial evidence.

We granted Capone permission to file a brief on her own behalf. She has filed a supplemental brief in two parts.

In part I, Capone claims (1) the plea agreement is ambiguous on the *Harvey* motion (*People v. Harvey* (1979) 25 Cal.3d 754); (2) the case was riddled with conflicts of interest because (a) both Deputy Alternate Public Defender Frank Birchak and the deputy district attorney worked for San Diego County, (b) District Attorney Bonnie Dumanis supported San Diego County Supervisor Bill Horn, and Capone had an acrimonious relationship with Horn, her former boss; (3) Birchak provided ineffective assistance of counsel; and (4) the record does not include a reporter's transcript of her first *Marsden* hearing.

In the absence of a certificate of probable cause, none of the claims raised in part I is cognizable on appeal. A defendant may not appeal a judgment of conviction based on a guilty plea unless the defendant has sought and obtained a certificate of probable cause from the trial court. (§ 1237.5.)[4] There are two recognized exceptions to this requirement. A defendant is not required to obtain a certificate of probable cause to appeal a ruling on a search and seizure issue. (*People v. Johnson* (2009) 47 Cal.4th 668, 677). A defendant is also not required to obtain a certificate of probable cause if the defendant is challenging an error occurring at a post-plea hearing to determine the degree of the crime and the penalty to be imposed, provided the error does not implicate the

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4 Section 1237.5 states: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

validity of the plea agreement. (*Id*. at p. 678.) If the post-plea error implicates the validity of the plea agreement, then a certificate of probable cause is still required. (*Ibid*.)

"In determining whether an appeal is cognizable without a certificate of probable cause, ' "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." ' If the challenge is in substance an attack on the validity of the plea, defendant must obtain a certificate of probable cause." (*People v. Emery* (2006) 140 Cal.App.4th 560, 564-565.)

In part II of her supplemental brief, Capone contends she received ineffective assistance of counsel from McClelland, who was appointed to represent her at the restitution hearing.

Section 1202.4, subdivision (f) requires a trial court to order restitution in every case in which a victim suffers economic loss as a result of the defendant's conduct. In determining the amount of such restitution, the court is vested with broad discretion. (*People v. Ortiz* (1997) 53 Cal.App.4th 791, 800.) "Once the victim makes a prima facie showing of economic losses incurred as a result of the defendant's criminal acts, the burden shifts to the defendant to disprove the amount of losses claimed by the victim." (*People v. Gemelli* (2008) 161 Cal.App.4th 1539, 1543.)

Capone contends McClelland provided ineffective assistance of counsel by not obtaining a continuance of the hearing for which she claims he was unprepared. Capone also asserts that McClelland failed to subpoena records showing she had repaid "thousands and thousands of dollars."

Capone has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) To prevail on such a claim, she must show that her counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, at p. 694.) In other words, to succeed on her claim, Capone would have had to demonstrate that but for McClelland's conduct, the court was reasonably likely to have ordered a lesser amount or no restitution. (See *People v. Foster* (1993) 14 Cal.App.4th 939, 947, superseded by statute on other grounds as stated in *People v. Birkett* (1999) 21 Cal.4th 226, 238-245).

Capone has failed to make the requisite showing for a successful ineffective assistance of counsel claim. Capone has submitted (1) copies of e-mails between herself and Sanchez to dispute the amount of restitution owed, and (2) copies of the victim restitution amount forms filled out by Sanchez, Alfonso Sanchez and Vanegas with Capone's handwritten notes contesting the amounts claimed. But the e-mails and Capone's handwritten notes on the restitution forms have no evidentiary value. Neither do Capone's unsworn statements in her supplemental brief. Capone had the burden below of demonstrating the amounts claimed by the victims were excessive. (*People v. Gemelli*, *supra*, 161 Cal.App.4th at pp. 1542-1543.) On appeal, Capone's submission of e-mails and her unsworn statements in her supplemental brief fail to show there is a reasonable probability that but for McClelland's conduct the court would have ordered

less or no restitution. In short, she has failed to meet her burden of demonstrating that a more favorable outcome was probable if McClelland had obtained a continuance and been more prepared.

Capone also faults McClelland for not subpoenaing records to substantiate her claims that she repaid part of the losses sustained by the victims of her crimes. This record is silent on this issue, and we are unable to determine whether or not Capone's statement is true. "It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal." (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.) Moreover, even if it were true that McClelland did not subpoena records that he should have, there is no showing of the requisite prejudice to support an ineffective assistance of counsel claim. (*Ibid.*; *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)[5]

Capone also disputes the amount of restitution awarded to some of the victims, including Crowder, Vanegas, Sanchez, Alonso Sanchez, Lancia, and Moser. At the restitution hearing, the parties entered into a stipulation that established the amount of the victim's losses for all but four victims. "[W]hen a party enters into a voluntary stipulation, [s]he generally is precluded from taking an appeal claiming defects in the stipulation" (*People v. Gurule* (2002) 28 Cal.4th 557, 623), and it may be assumed that the stipulation reflects " 'defendant's consent in the absence of an express conflict' "

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5 We also note that Capone did not attend the restitution hearing. The record shows that on two occasions, Capone waived her presence at the restitution hearing. The record does not contain any substantiation for Capone's unsworn statement that McClelland told her not to attend the restitution hearing.

(*People v. Hinton* (2006) 37 Cal.4th 839, 874). Our reading of the record does not reveal improprieties as to the restitution amounts ordered by the trial court to the four victims who testified. When considering a trial court's restitution determination, we consider whether it is arbitrary, capricious, or beyond the bounds of reason under all the circumstances. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.) On the record before us, there is no basis for finding the $915,395 restitution order is arbitrary, capricious, or exceeds the bounds of reason.

A review of the entire record pursuant to *People v. Wende, supra*, 25 Cal.3d 436, including the possible issue referred to pursuant to *Anders v. California, supra*, 386 U.S. 738, has disclosed no other reasonably arguable appellate issue. Competent counsel has represented Capone on this appeal.

II. PETITION FOR WRIT OF HABEAS CORPUS

In her petition for writ of habeas corpus, Capone contends the case is riddled with conflicts of interest, to wit: (1) the San Diego County District Attorney's office (district attorney's office) had a conflict of interest in prosecuting her because of her acrimonious relationship with County Supervisor Horn, a member of the board that sets the budget for the district attorney's office[6]; (2) the district attorney's office withheld evidence about criminal activities of Moser because he was a political contributor and friend of District Attorney Dumanis; and (3) the judge who presided over the preliminary hearing had a

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6 Capone also claims there was conflict because District Attorney Dumanis supported Horn's re-election to the county Board of Supervisors.

personal relationship and friendship with the district attorney's office investigator on the case and the investigator's wife, who is also a judge.

A conflict of interest sufficient to recuse a district attorney's office "exists whenever the circumstances of a case evidence a reasonable possibility that the [district attorney's] office may not exercise its discretionary function in an evenhanded manner." (*People v. Conner* (1983) 34 Cal.3d 141, 148.) "[T]he conflict must be of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered." (*Id.* at p. 147.)

Assumptions and appearances are not evidence. The *evidence* must show that there is a real, and not merely an apparent, likelihood of unfairness. (*People v. Eubanks* (1996) 14 Cal.4th 580, 592.) We see no evidence that the prosecution of Capone by the district attorney's office was affected by the acrimonious relationship between Capone and Supervisor Horn.[7]

Capone also claims her prosecution by the district attorney's office was tainted because Moser should have been a codefendant, but was not charged because he is a supporter and campaign contributor to District Attorney Dumanis. Again, Capone's petition for writ of habeas corpus lacks evidence to support these claims.[8]

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7 Capone's assertion that Birchak was ineffective for not informing her or the court of the conflict of interest involving the district attorney's office and Supervisor Horn is meritless.

8 We note that Capone's accusations of criminal behavior by Moser and other individuals associated with this case, which she blithely dispenses in her petition, do not lessen her criminal culpability.

Capone's claim that she was denied an impartial judge at the preliminary hearing is without merit. Superior Court Judge Cynthia Bashant, who was assigned to preside over the preliminary hearing, informed the parties at the outset of a potential conflict of interest—namely, that she knew the district attorney's investigator on the case and his wife, who is also a judge, and they have socialized at parties. "[T]he Due Process Clause clearly requires a 'fair trial in a fair tribunal,' [citation], before a judge with no actual bias against the defendant or interest in the outcome of his particular case." (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905.) Recusal of a judge under the due process clause is required when there exists " ' "the probability of actual bias on the part of the judge or decision maker [that] is too high to be constitutionally tolerable." ' " (*People v. Freeman* (2010) 47 Cal.4th 993, 996, quoting *Caperton v. A.T. Massey Coal Co., Inc.* (2009) ___U.S. ___, 129 S.Ct. 2252, 2259.) The probability of bias must clearly be established by an objective standard. (*People v. Freeman*, *supra*, at p. 1006.)

Capone's allegations do not support any doubt regarding Judge Bashant's ability to remain impartial. Judge Bashant performed her ethical duty to advise counsel of anything that might raise a potential or actual conflict. Judge Bashant's relationship with the district attorney's investigator and his wife, a fellow judge, was not of such a close personal nature to create a conflict. Capone's effort to create a disqualifying conflict on the part of Judge Bashant has no support in the record or in logic.

In her petition for writ of habeas corpus, Capone also claims that Birchak provided ineffective assistance of counsel for not pursuing a mental defense in light of her attempt to commit suicide on the day she was arrested. The claim is meritless. "Criminal trial

counsel have no blanket obligation to investigate possible 'mental' defenses, even in a capital case." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1244.) In any event, Capone's attempted suicide, as much as two years later than some of her crimes, would not have supported a mental defense of insanity—that is, at the time of the crime, she either could not know or understand the nature and quality of the act or could not distinguish right from wrong (§ 25, subd. (b)); *People v. Skinner* (1985) 39 Cal.3d 765). Further, in the absence of a showing that Capone was unable to assist in her defense, counsel was not ineffective in not seeking to institute a mental competency proceeding under section 1368.

Capone claims the change of plea form is ambiguous with respect to the *Harvey* waiver because "[i]n attorney Birchak's haste, he had me initial and 'x' the box." Capone continued: "To this day, I don't know what my rights are." However, at the change of plea hearing, Capone told the judge that she and Birchak went over the change of plea form carefully, she also read the form herself and she understood the contents of the form. In light of these acknowledgments made under oath, we do not find the plea form ambiguous.

Capone claims some of the evidence used against her was in Moser's possession and had been altered. But there is no support before us that documents were altered. Conclusory allegations do not merit relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) Capone also complains that the district attorney's investigator obtained evidence from her residence without a warrant. However, the investigator had the consent of Moser, with whom she lived, to search the residence. A warrantless search is valid if "permission to

search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." (*United States v. Matlock* (1974) 415 U.S. 164, 171.)

Capone's remaining complaints—not being provided discovery in a timely fashion, and not being allowed to attend a readiness conference to speak directly to the judge and prosecutor—do not warrant relief by writ.[9]

DISPOSITION

The judgment is affirmed; the petition is denied.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.

9 Capone's request for appointment of counsel is denied.